No. 1408

IN THE

United States
Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

JOHN J. CAMBERS, *Plaintiff in Error,*

vs.

FIRST NATIONAL BANK OF BUTTE, a Corporation, ANDREW J. DAVIS and GEORGE W. ANDREWS, *Defendants in Error.*

Brief for Plaintiff in Error.

Upon Writ of Error to the United States Circuit Court for the District of Oregon.

A. E. REAMES,
FRANK F. FREEMAN,
Attorneys for Plaintiff in Error.

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Brief for Plaintiff in Error.

This is an action brought by the plaintiff against the defendant, the First National Bank of Butte, for the sum of ten thousand dollars and interest from August 21, 1902, at the rate of eight per cent per annum, and against the defendants Andrew J. Davis and George W. Andrews for interest on the said sum at the rate of six per cent per annum from April 19, 1902, and is brought to this Court on writ of

error from the judgment of the Circuit Court of the United States for the district of Oregon sustaining the demurrer of the defendant, First National Bank of Butte, to the complaint on the ground that the complaint did not state facts sufficient to constitute a cause of action as against said defendant. The statement of the case may therefore be summarized from the allegations of the plaintiff.

Plaintiff alleges in substance as follows: That he is a citizen and resident of Oregon, residing in Jackson County therein, and that the First National Bank of Butte is a national banking corporation of Butte, Montana, and the defendants, Andrew J. Davis and George W. Andrews, are residents and citizens of Montana, the former being the President of the First National Bank of Butte.

That on March 20, 1902, in the District Court of Silver Bow County, Montana, there was made and entered a joint judgment in favor of William B. Hamilton, et al., as plaintiffs, against the plaintiff herein, John J. Cambers, and the defendants, Andrew J. Davis and George W. Andrews, defendants therein, for the sum of $12,500, upon two certain injunction bonds for the sums of $1,500 and $11,000, respectively, both of which bonds are mentioned in exhibit A, which was a contract attached to the complaint herein, and that thereby the liability of the said defendants, Andrew J. Davis and George W. Andrews, and each of them, upon said bonds was merged into said judgment.

That on April 19, 1902, the plaintiff had on de-

posit with the defendant bank at its place of business in Butte, Montana, and the defendant held in trust for the plaintiff, the sum of $10,000, and that on said day the plaintiff entered into a written contract, which is made a part of the complaint, with the defendants as parties of the second part, which contract in effect provided that the defendant bank should hold said deposit pending an appeal of the said case above mentioned to the Supreme Court of Montana, and that if the defendants, Andrew J. Davis and George W. Andrews, who had been sureties upon said injunction bonds, should be required to pay such judgment to indemnify them out of such deposit, but that if said defendants should not be required to pay said judgment or any part thereof, then that it should return the said sum of money to the plaintiff; that the said money should not be drawn out of the bank by any of the said sureties pending the appeal of the case, but should remain on deposit in the bank to reimburse the sureties for any sum which they may be required to pay as such sureties, and in case of no liability on their part by reason of said injunction bonds then to be paid to John J. Cambers, or his order; and the said Andrew J. Davis and George W. Andrews further promised and agreed to pay John J. Cambers interest on said sum at the rate of six per cent per annum so long as the same should remain on deposit in the said bank.

That the appeal from said judgment mentioned in the contract was never perfected and the time within which the same can be perfected has long

since gone by and no appeal can now be taken from said judgment.

That within sixty days immediately prior to August 21, 1902, an execution upon said judgment was duly issued and placed in the hands of the sheriff of Silver Bow County, Montana, with directions to make the amount thereof as provided by law; that on August 21, and before the time said execution under the Montana laws would have expired, and while the same was in full force and effect, the said sheriff returned said execution fully satisfied to the Clerk of the District Court in which the judgment was rendered; that under the laws of Montana then in force it was the duty of the Clerk of the Court to enter a satisfaction of said judgment upon the judgment docket of said court, and the Clerk did thereupon, on August 21, 1902, duly enter a satisfaction of said judgment on said judgment docket and satisfied said judgment as to each and all of the defendants in said case, and said satisfaction when so entered constituted a full and complete satisfaction in discharge of the judgment, and the said judgment was at said time fully satisfied and discharged; that by the laws of Montana then in force the entry of said satisfaction by the Clerk fully satisfied said judgment and relieved each of the parties against whom the said judgment had been entered from any liability thereon.

That said satisfaction of judgment has never been vacated, set aside or annulled, and by the laws then and now in force in Montana the time within which said judgment could have been reinstated or

the satisfaction thereof vacated has long since gone by.

That the said defendants herein have not nor had either or any of them paid said judgment or any part thereof prior to August 22, 1902, nor have they ever paid the same or any part thereof, nor are they or either of them liable to pay said judgment or any part thereof, nor can the same or any part thereof be enforced against either or any of them.

That the sum of $10,000 above mentioned is still on deposit with the defendant bank, and it has never repaid the same or any part thereof to the plaintiff, although demanded.

To the complaint the defendant bank interposed a demurrer upon the ground that the complaint did not state facts sufficient to constitute a cause of action as against it.

The demurrer was argued and Judge Wolverton filed an opinion in the Court below sustaining the demurrer upon the ground stated, and dismissing the complaint with costs to the defendant.

SPECIFICATION OF ERRORS.

The errors relied upon by the plaintiff are:

First: Error of the Court in sustaining the demurrer to the complaint.

Second: Error of the Court in dismissing the complaint herein with the costs to the defendant bank.

ARGUMENT.

The question then to be decided is whether or not a cause of action is stated by the plaintiff as against the bank. The contract and the complaint showed that Davis and Andrews were liable with Cambers upon the judgment against them for $12,500 and that their liability upon the injunction bonds had become merged in that judgment, and that the $10,000 deposited in the bank by Cambers was to indemnify them against this liability, and that when their liability upon that judgment ceased the bank agreed to return the $10,000 to Cambers.

It must, therefore, be shown by the plaintiff that this liability on the part of Davis and Andrews on the Hamilton judgment has ceased. The plaintiff has alleged in his complaint, and for the purposes of this argument it must be taken as true, that neither of the defendants herein have ever paid the judgment, so the bank cannot claim the right to hold the money on that score. The question then devolves upon the point as to whether or not Davis and Andrews are under any liability upon that judgment. The complaint alleges the issuance of an execution, that it was placed in the hands of the sheriff of Silver Bow County, Montana, and that he thereafter returned it to the Clerk of the Court fully satisfied, and that under the Montana laws then in force it was the Clerk's duty to enter a satisfaction of this judgment on the judgment docket, and that the Clerk did so, and that under the Montana laws the entry of that satisfaction fully satisfied the judgment and relieved each of the parties

against whom the judgment had been entered from any liability upon it. This was in August, 1902, and the complaint further shows said satisfaction has never been vacated, set aside or annulled, and that under the Montana laws the time within which the judgment could have been reinstated or the satisfaction thereof vacated, has long since gone by.

The learned judge in the Court below was of the opinion that the statements of the execution being returned fully satisfied and of the entry of satisfaction were statements of conclusions of law and not of probative facts, and that the complaint should go further and state how the execution was satisfied. (Record, pp. 38, 41 and 42.)

At the outset let us grant that for a **sheriff** to endorse upon an execution simply the words "wholly unsatisfied" and nothing more, or "fully satisfied" and nothing more, might be the **sheriff's** stating a conclusion of law. But this is not the question before us—we are not at this time concerned with the regularity or legality of the sheriff's official acts, for regularity and legality are presumed, (Murphree on Sheriffs, sec. 869) and in this case it would be for the defense to dispute and set aside this presumption, which, if they chose to do, would appear in the course of subsequent pleadings. The question is not "is it a conclusion of law for a sheriff to return an execution fully satisfied," but rather of this nature: In pleading an official act, must the pleader set up the act in detail, or is it sufficient to allege only the ultimate result.

Moreover, the averment under discussion must be segregated and distinguished from a class of allegations that are plainly conclusions on their face. For instance, it has been held that to aver "that an appraisement is valid," or that "an assignment is void," or that "an act is illegal," is to state merely a conclusion of law,—and there are numerous decisions of a similar nature. The averment with which the honored judge found fault was not a statement of an opinion merely, a conclusion that the pleader had formed in his own mind as to the satisfaction of the judgment, but a statement of fact —a statement that on a certain day the sheriff "returned said execution, fully satisfied, to the clerk of said district court,"—so satisfied that the said clerk entered the satisfaction of record, so satisfied that according to the laws of Montana, and of every other state, the judgment was fully discharged and all the parties thereto were relieved of their liability thereon—so satisfied that from that day, August 21, 1902, until February 7, 1905, a period covering approximately two and one-half years, the plaintiffs in execution did not see fit to have the said entry of satisfaction vacated, annulled or set aside, all of which facts appear in the amended complaint.

So far as we are able to discover, the exact averment under dispute has never come before the judicial notice of a court of final resort. Hence, we must seek our argument in parallels:

In pleading deeds, title, possession, etc., allegations of a very general character are universally admitted. For instance, the usual averment of posses-

sion runs after this fashion: "That at and during all the times herein mentioned, plaintiff has been and is now in possession of the said premises."

In deciding the case of Clarke v. Railway Co., 28 Minn. 71, Mitchell, J., says: "When a pleader alleges title to or ownership of property, or the execution of a deed in proper form, these are not statements of pure fact. They are all conclusions from certain probative or evidential facts not stated. They are in part conclusions of law, and in part statements of fact, or rather the ultimate facts drawn from those probative or evidential facts not stated; yet these forms are universally held to be good pleading."

In the case of Hanna v. Barker, 6 Colo. 303, there is an averment in the complaint that "The defendant made and entered into an agreement with the plaintiff," and counsel moved for non-suit. In commenting upon this, Beck, J., (page 312) says: "Counsel argue that even if it be said this averment covers a delivery of the agreement, then it is still insufficient because it is not an allegation of fact but a conclusion of law, which is not pleadable. This proposition is too refined. The same objection would apply to an allegation that the agreement was delivered, because delivery may have been actual, or it may have been constructive merely, and what amounts to a delivery is a question of law. Either averment, however, is that of an ultimate fact, which though a conclusion of law from the evidence is pleadable."

In pleading a judgment it is sufficient to say, after primary allegations of jurisdiction and the like, that "such proceedings were thereupon had that afterwards, by the consideration and judgment of the court, the plaintiff recovered the sum named." No details of the proceedings need be pleaded—the ultimate fact alone is required.

Now if it is sufficient to allege that "at and during all times herein mentioned plaintiff has been and now is in possession of certain premises," and if it is sufficient to say that "defendant made and entered into an agreement with plaintiff," and if it is sufficient to allege a judgment by saying that "such proceedings were thereupon had that plaintiff recovered a certain sum," why should it be declared insufficient to say that the sheriff "returned the execution fully satisfied"? Under such an allegation the return itself, disclosing what acts were performed by the sheriff leading up to his act of returning it, could be introduced in evidence to prove the ultimate fact we have alleged in the complaint.

A return itself is nothing more than evidence of the facts stated within it, and it is axiomatic that evidence need not be pleaded.

Why may we not follow the logic of Beck, J., (supra) when he reasons that delivery may have been actual or constructive, and that to aver that an agreement was delivered is a statement "of an ultimate fact, which though a conclusion of law from the evidence, is pleadable," and say that what amounts to full satisfaction is a question of law,

that there are a full half dozen ways of satisfaction, and to aver that an execution was returned fully satisfied is a statement of an ultimate fact, which, though partaking of the nature of a conclusion of law from the evidence, is pleadable.

The lower court in its opinion said: "As I have seen, the satisfaction of the judgment, if satisfied at all, must result through a merely ministerial act of the clerk on the satisfaction of the execution; but if the execution has not been shown by proper allegations to have been satisfied, then the judgment could not have been legally satisfied." . . . "The clerk could enter such satisfaction of the judgment as the facts of the return and the disposition of the money made under the execution would warrant; but without the proper basis for satisfying the judgment, the clerk could not perform his ministerial act and enter satisfaction." . . . "Such being the law, I am of the opinion that it is a conclusion of law, and not a statement of a probative fact, to allege merely that said sheriff 'returned said execution fully satisfied.'"

The foregoing excerpts from the court's opinion would seem to indicate that it is necessary when alleging a "satisfaction of judgment to show no liability," that the return on the execution, which is the basis upon which the clerk may exercise his ministerial act, must be set out in full in order to show a good cause of action.

Conceding, for the purpose of argument, that the allegation "returned the execution fully satisfied"

is a mere conclusion of law, it is the appellant's contention that in that light it should be treated as mere surplusage. The judgment having been alleged as satisfied, the legal presumption immediately arises in support of it that the ministerial officer did his duty, and if there is a lack of basis for the exercise of his act that fact is clearly a matter of defense.

The entry of a satisfaction of judgment on the record is in the nature of a receipt, and as such is prima facie evidence of a good, sufficient and legal satisfaction.

In support of the above proposition that a satisfaction of judgment is in the nature of a receipt, see the following cases and authorities:

Freeman on Judgments, Sec. 478a.

Dane v. Holmes, 41 Mich. 661.

Brown v. South Boston Sav. Bank, 148 Mass. 300.

Lewis v. Matlock, 3 Ind. 120.

Stewart v. Armel, 62 Ind. 593.

Lapping v. Duffy, 65 Ind. 299.

Lash v. Rendell, 72 Ind. 475.

Also see A. E. Enc., Vol. 19, p. 117, and note.

The fact as to whether or not the sheriff's return on the execution showed such facts as were a proper premise for the exercise of the clerk's ministerial act of satisfaction is no more required to be stated

in the complaint than are the facts tending to establish the truth or falsity of the return as set out by the sheriff. If the return is attacked the presumption is that it is true. "In such proceedings the return, however, is prima facie evidence of its own truthfulness."

Freeman on Executions, Sec. 367.

The legal presumption as to the truth and legality of the acts are as strong in the one case as the other. If the sheriff in executing the writ makes a false return thereon the clerk has no alternative, but must enter up the satisfaction or not, as the writ on its face directs. "Hence, if a writ be returned 'satisfied,' the clerk has no authority to issue an alias on the ground that the return of satisfaction was made by mistake."

Freeman on Executions, Sec. 364.

The legal presumption is that it is true and the burden of proving it otherwise is upon the assailant. Likewise if a clerk enters a satisfaction of record fraudulently, wrongfully, by mistake or without the proper premise for the exercise of that particular ministerial act, the presumption is in favor of the regularity and validity of his official or ministerial act. "It is a presumption of law that every one has conformed to the law, and the burden of proof is on him who alleges the contrary. This presumption operates in favor of the regularity and validity of official acts."

19 A. & E. Ency. Law, p. 43.

Where an officer makes a false return, it must, as between the parties to the suit, as long as it remains unvacated, be regarded as true.

Freeman on Executions, Sec. 364.

If we should ask why is it that judgments need not be set out in detail, one answer might be this: A cause once decided is res adjudicata between the parties thereto—they or their privies are bound by the decision until reversed by proper proceedings, and the presumption that all courts act regularly and legally renders a general allegation of the judgment all that is necessary.

A sheriff's return on an execution is also in the nature of res adjudicata—it is conclusive between the parties and those in privity with them; it cannot be set aside except for fraud, illegality or irregularity. The specific return in question, though two and one-half years had elapsed between its recording and the inception of this action, has never been legally set aside, as the amended complaint sets out.

In the case of McGregor v. Wells, Fargo & Co., 1 Montana 145, the Supreme Court of that state held that the court had no power to quash or annul, on motion, a return on evidence aliunde of irregularity, falsehood or illegality in the conduct of the sheriff. The remedy of the party aggrieved is an action against the sheriff. The plaintiffs in execution are bound by it conclusively. And since this is the fact, and since it is a legal conclusion that all official acts are regular, why should the plaintiff in this cause be required to set up more than the fact

that a return showing full satisfaction was made? To plead more would be to plead the evidence—to require more, in this and parallel cases, would tend to make all pleadings prolix and wearisome.

In Grinde v. Railway Co., 42 Ia. 377, a further light is shed on the controversy by Rothrock, J.: "It is not allowable to plead mere abstract conclusions of law, having no element of fact: they form no part of the allegation constituting a cause of action; but if they contain the elements also of a fact, construing the language in its ordinary meaning, then force and effect must be given to them as allegations of fact, as when necessaries are furnished to an infant, or when a deed or mortgage is alleged as having been made, or the ownership of property is asserted; the general allegation is sufficient, being the ultimate fact to be established by the evidence."

This narrows the question still further: Does the allegation that the sheriff returned the execution fully satisfied, when construed in the ordinary meaning of language, contain sufficient elements of a fact to justify this honorable Court in holding the complaint sufficient? To say that the sheriff returned the execution can be held nothing less than a fact; to say that he returned it fully satisfied, is describing generally the manner in which the execution was made, the specific manner of execution to be established by a submission of the return in evidence, provided the defense made issue on that point. True, the allegation is general in form; but the ultimate fact is there, and in the light of reason

and the citations above we believe the statement is sufficient—it is based on evidence to be declared on trial if necessary.

It appears to counsel for the plaintiff that pleading a sheriff's return of an execution fully satisfied, without stating that he sold some property or collected the money with which to satisfy it, can be no more a statement of a conclusion of law than pleading as a basis of complaint the execution and delivery of a promissory note, without stating that the plaintiff actually loaned the money for which the note was given. The note itself is only evidence of the transaction between the parties, but it is a sufficient fact upon which to base a complaint to recover the money for which it is given. Should the plaintiff be required, in pleading a return of a sheriff to the effect that the judgment is fully satisfied, to state just what action the sheriff took to collect the money, he should also be required, in pleading that a judgment was made and entered in a certain court on a certain day, to state the facts of the litigation leading up to that judgment. It appears to counsel that the return of the sheriff is an ultimate fact to be pleaded, and the manner in which the satisfaction of the judgment was brought about is only an incident in the proceedings, and evidence of the ultimate fact that the judgment was satisfied. A judgment may be satisfied in numerous ways aside from payment in cash or satisfied from levy and sale of property. If the plaintiffs in the Montana case had agreed with Davis and Andrews to release them in consideration of procuring their assistance in mak-

ing this judgment out of Cambers' property in Oregon, this fact would release Cambers. If in pursuance of that agreement, and under the direction of the plaintiffs' attorneys and the attorneys for Davis and Andrews, the sheriff returned the judgment as fully satisfied, the judgment would be as effectually extinguished as if the money had been paid. The plaintiff goes further in this case and pleads the entry of satisfaction upon the record, and until that satisfaction is vacated or annulled and the judgment reinstated of record no execution could be issued thereon as against Davis and Andrews.

In 17 Am. & Eng. Ency. of Law (2 ed.), p. 865, it is stated that the legal effect of the entry of satisfaction of a judgment is the extinguishment of the judgment debt. This being so, then the judgment against Cambers and Davis and Andrews is extinguished and the two last named are under no liability thereon, and under the contract with the bank the money deposited with it by Cambers should be returned to him. The clerk of the court, under the decisions cited in the work above mentioned, has no authority to vacate this entry of satisfaction. The complaint shows that according to the Montana laws the time for vacating or annulling it or reinstating the judgment has long since gone by, and the judgment must remain of record as a satisfied one. In any event, no judgment can be reinstated, even if the time for reinstatement were not restricted, without notice to all the judgment debtors whose rights would be affected by this reinstatement.

19 Ency. Pl. & Pr. 143, and cases cited.

If the demurrer in this case is sustained it would be within the power of the bank to hold the $10,000 belonging to Cambers for all time to come, neither paying it to Davis or Andrews or Cambers or to the judgment creditor in the Montana litigation. Supposing the judgment to have been satisfied by agreement between the parties, or any other way than by levy and sale of property or by actual payment in cash, and such satisfaction entered of record, counsel's argument would then be that this $10,000 must remain where it now is in the bank, because the plaintiff does not allege what action was taken by the sheriff leading up to the making of his return; and in such a case what specific acts could he enumerate in his return? Going further, supposing a judgment had been satisfied after the manner above set forth and no execution had been issued or returned, and by a direction of the plaintiff in that judgment the clerk entered up a satisfaction in accordance with that agreement, would not that entry of satisfaction be a fact to be pleaded, the legal effect of which is the extinguishment of the judgment debt? And when it is shown in addition to this that many years have elapsed since the record of satisfaction and that it cannot now be assailed, who can say that any of the judgment debtors are now liable thereon?

We respectfully submit that the decision of the lower Court should be reversed and the case brought on regularly for trial upon its merits.

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